UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

GRACE HUTCHISON,

Debtor.

Case No. 99-5371-WRS
Chapter 13

Memorandum Decision

I

This Chapter 13 case is before the Court upon the Debtor's motion to reopen the case and to hold the Asociacion de Empleados del ELA (Puerto Rico Commonwealth Employees Association) ("Association") in contempt for freezing a savings account. (Docs. 19, 25). For the reasons set forth below, the Court GRANTS the Debtor's motion to reopen the case to consider her motion to hold the Association in contempt. Having considered the Debtor's motion on its merits, the Court finds that the Association may offset the indebtedness owed it against the Debtor's savings account. Accordingly, the Debtor's motion to hold the Association in contempt is DENIED.

This Chapter 13 case was filed on October 28, 1999. On December 22, 1999, the Court confirmed the Debtor's Chapter 13 Plan. (Doc. 9). On December 5, 2000, the Court entered an order of discharge and this case was subsequently closed. (Doc. 17).[1] At the time this case was filed, the Debtor was indebted to the Association on an automobile loan in the amount of $9,539.24 and a Master Card account in the amount of $557.67. In addition, the Debtor has a savings account with the Association with a balance in the amount of $2,442.46. The Debtor has made demand for the funds in the account. The Association has refused, freezing the account and requesting leave to offset the savings account against the indebtedness owed the Association. (Doc. 28).

There are at least two items in the Court's file that are of interest here. First, the only

[1] The Debtor incorrectly stated in her motion that her case was dismissed.

disbursements made by the Trustee were to the Debtor's lawyer in payment of his attorney's fees. (Doc. 16). It appears that none of the creditors filed claims and accordingly were not paid. Second, the bank account in question was not disclosed on the Debtor's schedules. The Debtor had over $2,400.00 on deposit with the Association, but did not disclose that in the Schedules. Rather, she disclosed only a $100 savings account at an undisclosed bank.

II.

The question presented is whether the Association's right of offset against an undisclosed bankruptcy account survived the Debtor's Chapter 13 bankruptcy proceedings. The Debtor contends that the confirmation of her Chapter 13 Plan and the subsequent discharge entered by the Court vests those funds in her free and clear of any interest of the Association. If this is so, then the Association is not entitled to offset the indebtedness owed it against the savings account. The Association contends that it holds a valid lien and right of offset against the savings account and that its rights were not affected by the intervening Chapter 13 proceeding.

Section 1327 of Title 11 of the United States Code provides as follows:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S.C. § 1327.

The Association alleges, and the Debtor does not dispute, that as a matter of Puerto Rican law, the Association has a lien upon the subject bank account to secure the indebtedness owed to it. (Doc. 28). It is further undisputed that, as a matter of Puerto Rican law, the Association has the right to offset the indebtedness owed it against the bank accounts.

Section 553(a) of Title 11 of the United States Codes, provides as follows:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that–
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> (1) the claim of such creditor against the debtor is disallowed;
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> (2) such claim was transferred, by an entity other than the debtor, to such creditor–
>
> (A) after the commencement of this case; or
>
> (B) (i) after 90 days before the date of the filing of the petition; and
> (ii) while the debtor was insolvent; or
>
> (3) the debtor owed to the debtor by such creditor was incurred by such creditor–
>
> (A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. § 553(a). As none of the exceptions to Section 553(a) apply in this instance, it appears that the proposed offset executed by the Association is proper.

The conflict between these two provisions has been resolved by the Eleventh Circuit in a case handed down in 1989. See Southtrust Bank v. Thomas (*In re* Thomas), 883 F.2d 991 (11th Cir. 1989). In Thomas, Southtrust Bank had a security interest in a mobile home. The Bank failed to file a proof of claim and accordingly, was not paid. The Court held that Section "1327 does not operate to extinguish a lien on property passing through bankruptcy for which no proof of claim is filed." *In re* Thomas, 883 F.2d at 998; see also Deutchman v. Internal Revenue Service (*In re* Deutchman), 192 F.3d 457, 460-61 (4th Cir. 1999) (unless the debtor takes affirmative action to avoid the lien, it passes through bankruptcy unaffected); Cen-Pen Corporation v. Hanson, 58 F.3d 89, 92-93 (4th Cir. 1995) (failure to file proof of claim does not, without more, result in avoidance of liens). But cf. *In re* Penrod, 50 F.3d 459, 462-63 (7th Cir. 1995) (default rule in case under Chapter 11 is that lien of creditor who participates in proceedings may be extinguished).

This Court handed down a decision in a case under Chapter 12 which is analogous to the case at bar. See Holloway v. Golden Peanut Company (*In re* Holloway), 254 B.R. 289 (Bankr. M.D. Ala. 2000)(Sawyer, C.J.), aff'd 261 B.R. 490 (M.D. Ala. 2001)(Albritton, C.J.). In Holloway, a judgment lien creditor was treated as unsecured under the debtor's plan. This Court held that confirmation of the Chapter 12 Plan, without more, did not divest the judgment lien creditor of its lien upon the debtor's

property. *In re* Holloway, 254 B.R. at 291-95. This Court will apply the same reasoning here, finding that the lien of the Association, and its corresponding right of offset, survives the Debtor's bankruptcy proceeding.

As the cases cited above show, the question raised here is a difficult one on which courts are divided. However, there is one fact present in this case which distinguishes it from all of the other cases cited and which, in this Court's view, simplifies the case considerably. As noted, Section 1327(a) states, "the provisions of a confirmed plan bind the debtor and each creditor." Referring to the Debtor's Plan, Paragraph 3(C) provides as follows.

> "C. Secured Claims. (A creditor's secured claim shall be the net amount due as of the date of filing or the value of the collateral to which creditor's lien attaches, whichever is less. Interest shall be allowed at contract rate or 12.00APR whichever is less. Creditor shall retain its lien until the allowed secured portion of the claim is fully paid.)
>
> CREDITOR & COLLATERAL, i. Secured Claims – Paid in full. AEELA 1997 Mits. Mirage, Rate 12.00%, Claim $9,831.11, Payment Schedule $454.55 per month.

The lien of the Association on the Mitsubishi Mirage automobile appears to have been provided for under the plan. However, as it did not file a claim, the Trustee did not make any payments to the Association. To the extent that the lien of Association on the Mitsubishi Mirage is unpaid, the Association is free to repossess the automobile. As indicated in the Plan, "creditor shall retain its lien until the allowed secured portion of the claim is fully paid." As the claim was not paid, the lien remains in effect. However, the Debtor's in personam liability on the indebtedness has been discharged.

Returning to the question of the $2,400.00 savings account, it is clear that the Debtor's Plan

makes no provision for the lien of the Association. As of the date the petition in this case was filed, the Association had security interests in both the automobile and the savings account. That the security interest in the automobile was explicitly provided for under the Plan, does not mean that the lien on the undisclosed bank account is avoided. Because there is no provision for this property interest of the Association, the lien survives the Debtor's bankruptcy.

The Debtor's position becomes even more untenable when one considers that the subject bank account is not disclosed. To be sure, an unspecified $100 account was disclosed in Schedule B, however no mention is made of a savings account issued by the Association. A Debtor's failure to disclose assets is a serious matter which may result in the dismissal of a bankruptcy case, 11 U.S.C. §§ 707(b), 1307; the denial of discharge, 11 U.S.C. § 727(a); or even criminal prosecution, 18 U.S.C. § 157. To contend, as the Debtor does here, that a security interest in an undisclosed asset is avoided because it is not mentioned in the Plan is outrageous. This Court will not allow its process to be abused in this manner.

III

For the reasons set forth above, this Chapter 13 case is REOPENED. Having considered the position of the Debtor on the merits, the Court finds that the proposed offset is proper. The Debtor's motion to hold the Association in contempt is DENIED.

Done this 16th day of January, 2003.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Debtor
Curtis C. Reding, Trustee
Richard R. Klemm, Attorney for Debtor
Reinaldo Babilonia, Attorney for Creditor
P.O. Box 364508
San Juan, Puerto Rico 00936-4508